

Honorable Joseph C. Welty
Criminal Department Presiding Judge
Superior Court of Arizona, Maricopa County
175 W. Madison St.
Phoenix, AZ 85003
(602) 372-2537

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

} Supreme Court No. R-13-0014

}
} AMENDED PETITION TO AMEND
} RULE 17.4 OF ARIZONA RULES
} OF CRIMINAL PROCEDURE
}

On January 10, 2013, the Superior Court of Arizona in Maricopa County submitted a petition to amend Rule 17.4 of the Arizona Rules of Criminal Procedure. *See* R-13-0014. Following the filing of the petition, representatives of limited jurisdiction courts raised concerns that the proposed amended rule would negatively impact limited jurisdiction courts. The Superior Court sought to amend Rule 17.4 to create a record of the plea bargaining process in response to *Missouri v. Frye*, 132 S. Ct. 1399 (2012), as the opinion suggested. *See Frye*, 132 S.Ct. at 1049 (“States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges.”). The Superior Court did not intent to impact the limited jurisdiction courts with the proposed rule amendment. To that end, the Criminal Department Presiding Judge of the Superior Court of Arizona in Maricopa County, respectfully petitions this Court to adopt the attached amended proposal to modify Rule 17.4 of the Arizona Rules of Criminal Procedure.

In its current version, Rule 17.4 fails to create a record of the plea bargaining process. To eliminate unnecessary evidentiary hearings in post-conviction relief proceedings, in which a defendant claims a plea offer was made

and not communicated to him or her, the Superior Court proposes amending Rule 17.4 to create a record in the Superior Court of unaccepted plea offers:

b. Plea Offer.

(1) Superior Court. In Superior Court, the terms of any unaccepted plea offer shall be reduced to writing and shall identify all parties and counsel involved. The plea offer shall be filed by the prosecutor as a confidential document no later than five court days after the plea offer has expired or has been rejected. The plea offer shall be maintained by the clerk as a confidential record and only available to the parties, the parties' attorneys, court personnel and any other person or agency authorized by court order.

(2) Courts of Limited Jurisdiction. In limited jurisdiction courts, the court may require, by administrative order or an order in a specific case, that the terms of any unaccepted plea offer be reduced to writing and filed with the court.

c. Duty of the Superior Court. Before proceeding to trial, the Superior Court shall inquire of the parties whether they have engaged in settlement discussions and if so, insure that the record required by subsection (b) of this rule has been filed.

The above proposal limits the impact to Superior Court, yet allows limited jurisdictions to order such a record to be created and maintained. The procedure outlined above for Superior Courts is similar to the procedure in Federal Rule of Criminal Procedure 11 which requires “The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.”

The Superior Court believes these amendments to Rule 17.4 will create a sufficient record in the trial court to safeguard against “late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences,” without creating additional hearings or adding an undue burden on either the prosecution or defense.

//

1 For the foregoing reasons, the Criminal Department Presiding Judge
2 of the Superior Court in Maricopa County respectfully requests this Court
3 approve this amended rule petition to amend Rule 17.4 to create a record of plea
4 offers before trial.

5 Respectfully submitted this 25th day of April, 2013.

6
7
8

Hon. Joseph C. Welty
9 Criminal Department Presiding Judge
Superior Court of Arizona, Maricopa County
10

11 Original and six (6) copies delivered this
12 25th day of April, 2013 to:

13 Clerk of the Arizona Supreme Court
14 1501 W. Washington, Suite 402
15 Phoenix, AZ 85007

16 Copy delivered this
17 25th day of April, 2013 to:

18 David K. Byers, Director
19 Administrative Office of the Courts
20 1501 W. Washington St.
Phoenix, Arizona 85007
21
22
23
24
25
26
27
28

Exhibit A

Rules of Criminal Procedure

Rule 17.4 Plea negotiations and agreements

a. Plea Negotiations. The parties may negotiate concerning, and reach an agreement on, any aspect of the case. At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice. Before such discussions take place, the prosecutor shall afford the victim an opportunity to confer with the prosecutor concerning a non-trial or non-jury trial resolution, if they have not already conferred, and shall inform the court and counsel of any statement of position by the victim. If the defendant is to be present at any such settlement discussions, the victim shall also be afforded the opportunity to be present and to state his or her position with respect to a non-trial or non-jury trial settlement. The trial judge shall only participate in settlement discussions with the consent of the parties. In all other cases, the discussions shall be before another judge or a settlement division. If settlement discussions do not result in an agreement, the case shall be returned to the trial judge.

b. Plea Offer.

(1) Superior Court. In Superior Court, the terms of any unaccepted plea offer shall be reduced to writing and shall identify all parties and counsel involved. The plea offer shall be filed by the prosecutor as a confidential document no later than five court days after the plea offer has expired or has been rejected. The plea offer shall be maintained by the clerk as a confidential record and only available to the parties, the parties' attorneys, court personnel and any other person or agency authorized by court order.

1 **(2) Courts of Limited Jurisdiction.** In limited jurisdiction courts, the court
2 may require, by administrative order or an order in a specific case, that the
3 terms of any unaccepted plea offer be reduced to writing and filed with the
4 court.

5 **c. Duty of the Superior Court.** Before proceeding to trial, the Superior Court
6 shall inquire of the parties whether they have engaged in settlement discussions
7 and if so, insure that the record required by subsection (b) of this rule has been
8 filed.

9 **bd. Plea Agreement.** The terms of a plea agreement shall be reduced to writing
10 and signed by the defendant, the defendant's counsel, if any, and the prosecutor.
11 An agreement may be revoked by any party prior to its acceptance by the court.

12 **ee. Determining the Accuracy of the Agreement and the Voluntariness and**
13 **Intelligence of the Plea.** The parties shall file the agreement with the court, which
14 shall address the defendant personally and determine that he or she understands
15 and agrees to its terms, that the written document contains all the terms of the
16 agreement, and that the plea is entered in conformance with Rules 17.2 and 17.3.

17 **df. Acceptance of Plea.** After making such determinations and considering the
18 victim's view, if provided, the court shall either accept or reject the tendered
19 negotiated plea. The court shall not be bound by any provision in the plea
20 agreement regarding the sentence or the term and conditions of probation to be
21 imposed, if, after accepting the agreement and reviewing a presentence report, it
22 rejects the provision as inappropriate.

23 **eg. Rejection of Plea.** If an agreement or any provision thereof is rejected by the
24 court, it shall give the defendant an opportunity to withdraw his or her plea,
25 advising the defendant that if he or she permits the plea to stand, the disposition of
26 the case may be less favorable to him or her than that contemplated by the
27 agreement.
28

fh. Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Arizona Rule of Evidence 410.

gi. Automatic Change of Judge. If a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself, but no additional disqualification of judges under this rule shall be permitted.

CREDIT(S)

Amended Sept. 24, 1992, effective Sept. 30, 1992, adopted in final form Feb. 25, 1993; July 28, 1993, effective Dec. 1, 1993; Jan. 22, 1997, effective from Feb. 1, 1997 through Jan. 31, 1999. Amended January 29, 1999, effective from February 1, 1999 to July 1, 1999; June 17, 1999, effective July 1, 1999; Sept. 8, 2011, effective Jan. 1, 2012.

16A A. R. S. Rules Crim. Proc., Rule 17.4, AZ ST RCRP Rule 17.4 COURT COMMENT TO 1999 AMENDMENT

In adopting a statewide amendment permitting judges to participate in plea negotiations, the Court expects that all lawyers--prosecutors and defense counsel alike--will cooperate in the use of this rule, and that judges will avoid coercive behavior of any kind.

COMMENT [AMENDED 201307]

Rule 17.4 is drawn from the ABA, Standards Relating to Pleas of Guilty §§ 2.1(a)(ii)(4), 3.1 and 3.3 (Approved Draft, 1968), Ill. Ann. Stat. Ch. 110A, § 402 (Smith-Hurd, Cum. Supp. 1971), and proposed Federal Rules of Criminal Procedure, Rule 11(d) (Preliminary Draft, April 1971).

See *Santobello v. New York*, 92 S.Ct. 495, 404 U.S. 257, 261-62, 30 L.Ed.2d 427 (1971).

See also *Brady v. United States*, 90 S.Ct. 1463, 397 U.S. 742, 751-752, 25 L.Ed.2d 747 (1970); ABA, *supra*, at § 3.1. Plea bargaining is a recognized part of the Arizona criminal process. See, *e.g.*, *State v. Jennings*, 104 Ariz. 6, 448 P.2d

62, modified in 104 Ariz. 159, 449 P.2d 938 (1969); State v. Carpenter, 105 Ariz. 504, 467 P.2d 749 (1970).

Rule 17.4 (a). Plea bargaining and plea agreements may cover any and all aspects of the disposition of the case. See Forms 18(a) and (b).

Under section (a) the parties may discuss and agree to the type, length or range of sentence to be imposed. However nothing in this rule is intended to restrict the court's duty and power to determine and impose sentence under Ariz.Rev.Stat. Ann. § 13-1642 (1956) [repealed]. See Rules 17.4(f~~d~~) and (g~~e~~).

Rule 17.4 (b)(1). Filing the plea offer as a confidential document is intended to encourage settlement and prevent any inappropriate inferences from being drawn.

Rules 17.4 (d~~b~~) and (e~~e~~). These provisions formalize the agreement and require oral confirmation in order to insure that both parties, the sentencing court, any reviewing court, and the public know exactly what promises have been made.

Requiring that negotiations, if any, be carried on through defendant's counsel, if he has one, follows ABA, Code of Professional Responsibility, EC-7-18 (1969); ABA, Standards Relating to Pleas of Guilty § 3.1(a) (Approved Draft, 1968). Some federal cases have held that plea negotiations constitute a critical stage of the proceedings requiring counsel. *E.g.*, Anderson v. State of North Carolina, 221 F.Supp. 930 (W.D.N.C.1963); see also Argersinger v. Hamlin, 92 S.Ct. 2006, 407 U.S. 25, 32 L.Ed.2d 530 (1972).

Rules 17.4(f~~d~~) and (g~~e~~). These provisions are modeled after Ill. Ann. Stat. Ch. 110A, § 402(d)(2) (Smith-Hurd, Cum.Supp.1971), proposed Federal Rules of Criminal Procedure, Rules 11(e)(3) and (4) (Preliminary Draft, April 1971), ABA, Standards Relating to Pleas of Guilty, at §§ 2.1(a)(ii)(4) and (5) and 3.3(b) (Approved Draft, 1968), and Ariz.Rev.Stat. Ann. § 13-1642 (1956) [repealed].

Rule 17.4(h~~f~~). This provision is taken from proposed Federal Rules of Criminal Procedure, Rule 11(e)(6) (Preliminary Draft, 1971); ABA, Standards Relating to Pleas of Guilty, at § 2.2 (Approved Draft, 1968); and Ill. Ann. Stat. Ch. 110A, § 402(f) (Smith-Hurd, Cum.Supp.1971).

Rule 17.4(i~~g~~). See Gregg v. United States, 89 S.Ct. 1134, 394 U.S. 489, 22 L.Ed.2d 442 (1969), rehearing denied 89 S.Ct. 1738, 395 U.S. 917, 23 L.Ed.2d 232.